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No. 97-9217

In The

Supreme Court of the United States

October Term, 1998

MANUEL DEJESUS PEGUERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

This Court granted certiorari to resolve a split among the circuits regarding the remedy to be applied when a district court fails to notify a defendant of his appellate rights, as required by former Rule 32(a)(2) and current Rule 32(c)(5) of the Federal Rules of Criminal Procedure. Under the majority approach, the district court automatically reinstates the defendant's appellate rights; under the minority approach, the district court must first determine whether the defendant was prejudiced by the violation of the rule. The government has filed a brief raising several arguments in opposition to the majority rule and in favor of the minority rule. In this reply brief, the petitioner will respond to seven of the government's arguments.

1. Significance of the Problem

The government suggests that there is no significant lack of compliance with the rule. Specifically, the government argues, at page 21 of its brief, that the failure to warn a defendant of his right to appeal represents the "unusual case." Petitioner submits that the government has incorrectly assessed the scope of the problem.

Effective December 1, 1989, Criminal Rule 32(a)(2) was amended to require district courts to advise defendants that they had the right to appeal their sentences. Order of the Supreme Court, April 25, 1989, 490 U.S. 1135, 1140. Counsel has identified 31 published and unpublished cases which reflect that defendants

sentenced after December 1, 1989, were *not* advised of their appellate rights.[1]

This case law suggests that failure to follow the rule does not represent the "unusual case," but rather represents a recurring problem in the district courts.

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[1] *United States v. Campo*, 140 F.3d 415, 418 (CA2 1998); *Esposito v. United States*, 135 F.3d 111, 112 (CA2 1997); *Reid v. United States*, 69 F.3d 688, 689 (CA2 1995); *United States v. Ferraro*, 992 F.2d 10, 11 (CA2 1993); *United States v. Robinson*, 1998 WL 729244 (CA4 1998) (unpublished); *United States v. Hyden*, 1997 WL 130376 (CA4 1997) (unpublished); *United States v. Talbott*, 1996 WL 453469 (CA4 1996) (unpublished); *United States v. Shulman*, 1996 WL 245269 (CA4 1996) (unpublished); *United States v. Butler*, 938 F.2d 702, 703 (CA6 1991); *Tress v. United States*, 87 F.3d 188, 189 (CA7 1996); *Alvarez v. United States*, 1995 WL 63013 (CA7 1995) (unpublished); *United States v. Caswell*, 36 F.3d 29, 30 (CA7 1994); *United States v. Mosley*, 967 F.2d 242, 243 (CA7 1992); *McCumber v. United States*, 30 F.3d 78, 79 (CA8 1994); *Schultz v. United States*, 1993 WL 53168 (CA8 1993) (unpublished); *United States v. Beston*, 936 F.2d 361, 362 (CA8 1991); *Biro v. United States*, 24 F.3d 1140, 1141 (CA9 1994); *United States v. Stirn*, 1992 WL 367748 (CA9 1992) (unpublished); *United States v. Glantz*, 1991 WL 184821 (CA9 1991) (unpublished); *United States v. Brown*, 1994 WL 242224, note 4 (CA10 1994) (unpublished); *Thompson v. United States*, 111 F.3d 109 (CA11 1997); *United States v. Sanchez*, 88 F.3d 1243 (CADC 1996); *United States v. Sanchez*, 1998 WL 195727 (EDPA 1998); *Davis v. United States*, 1997 WL 115561 (SDNY 1997); *Cordero v. United States*, 1996 WL 635712 (EDNY 1996); *Gaeta v. United States*, 921 F.Supp. 864, 865 (D.Mass 1996); *Wlodyka v. United States*, 1994 WL 262910 (DNH 1994); *Esposito v. United States*, 1993 WL 513292 (NDNY 1993); *Hernandez v. United States*, 839 F.Supp. 140, 146 (EDNY 1993); *United States v. Osoria*, 1992 WL 209979 (EDLA 1992); *United States v. Padilla*, 1990 WL 33761 (SDNY 1990).

2. Burdens Associated with Resentencing

In opposing the majority rule, the government complains of the costs associated with conducting a second sentencing hearing (Government Brief, pg. 9). This concern is overstated, as the decision whether to conduct a second sentencing hearing is solely within the discretion of the district court.

A defendant's appellate rights may be reinstated without conducting a second sentencing hearing. Instead of conducting a hearing, the district court can simply issue an order vacating the original judgment, reimposing the original sentence, and directing the clerk to file a *pro se* notice of appeal. *Gaeta v. United States*, 921 F.Supp. 864, 866 (D.Mass 1996) (Tauro, C.J.). The procedure utilized in *Gaeta* was recently cited with approval in *United States v. Gipson*, 22 F.Supp.2d 46, 48 (WDNY 1998) (Larimer, C.J.).

It is true that in the appropriate case, the district court may choose to conduct a new sentencing hearing. Mr. Peguero has requested such a hearing in this case, so that he may attempt to secure a downward departure for post-conviction rehabilitation under *United States v. Sally*, 116 F.3d 76 (CA3 1997). He does not, however, seek to litigate any claim which could have been raised at the first sentencing hearing.

3. Effect on the Judgment of Conviction

The government suggests, at page 16 of its brief, that the petitioner is seeking to overturn a final conviction on collateral review. This suggestion is not accurate. Mr. Peguero seeks reinstatement of his right to pursue a

direct appeal, but is not challenging the judgment of conviction.

The government's analysis would be correct if the petitioner were pursuing a post-conviction challenge to the guilty plea colloquy under Criminal Rule 11. Collateral relief under Rule 11 would indeed overturn the judgment of conviction. By contrast, the remedy for a Rule 32(a)(2) violation is reinstatement of the right to direct appeal, a result which leaves intact the plea of guilty and the judgment of conviction.

4. Purpose of the Rule

While conceding that the district court violated Criminal Rule 32(a)(2), the government maintains that the judgment below should be affirmed because "the purpose of the Rule is met." (Government Brief at 17, 18). Petitioner disagrees. As noted by Judge Heaney of the Eighth Circuit, one of the purposes of adopting Rule 32(a)(2) was to "eliminate litigation over whether the defendant had been apprised of his appeal rights by his attorney." *United States v. Drummond*, 903 F.2d 1171, 1175 (CA8 1990) (Heaney, J., dissenting). "A bright-line rule requiring notice in all cases was adopted to eliminate persistent litigation over whether the defendant had been fully informed of his rights by his counsel." *Id.*

The judge's obligation to inform the defendant of his appellate rights assumes even greater importance in this era of guideline sentencing. Congress directed, as part of the Sentencing Reform Act of 1984, that Rule 32(a)(2) be amended to require the judge to advise the defendant of his right to appeal the sentence. Sentencing Reform Act of

1984, Public Law 98-473, Title II, Section 215(a), 98 Stat. 2014, 2015 (Oct. 12, 1984). "Congress enacted this amendment to rule 32 as part of its guidelines system of sentencing reform under which a right to appeal one's sentence has become more meaningful." *United States v. Ferraro*, 992 F.2d 10, 11 (CA2 1993). The purpose behind this amendment is better served by the majority rule, which strictly applies the requirement of appellate notification.

5. Efficiency

Under the majority rule, the right of direct appeal is reinstated where the existing district court record reflects that the judge did not warn the defendant of his or her appellate rights. Circuit courts have repeatedly recognized that this approach prevents excessive litigation and promotes judicial efficiency. *See Reid v. United States*, 69 F.3d 688, 689 (CA2 1995) ("We remain persuaded that the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2)"); *United States v. Sanchez*, 88 F.3d 1243, 1247 (CADC 1996) (same); *Thompson v. United States*, 111 F.3d 109, 111 (CA11 1997) (same).

The government asserts that the claimed benefits of judicial efficiency are overstated. They note several exceptions to the *per se* rule, and argue that application of these exceptions, along with consideration of additional exceptions, undermines the force of petitioner's efficiency argument (Government Brief at 23).

The courts of appeals have indeed recognized three exceptions to the rule of automatic reinstatement. The

Third Circuit will not grant relief where the record reflects that the district court judge advised the defendant of his appellate rights at a guilty plea hearing held close in time to the sentencing hearing. The Eleventh Circuit will not entertain a claim for relief where the defendant did, in fact, file a timely appeal. The Second and Sixth Circuits will deny relief where the defendant signed a plea agreement expressly waiving the right to appeal. (Brief of Petitioner at 11). All these exceptions have one thing in common – each can be applied on the existing record without the need for an evidentiary hearing. The government's rule, by contrast, will normally require an evidentiary hearing on the question of prejudice. Thus, even with certain narrow exceptions, the majority rule of automatic reinstatement best serves the interests of judicial efficiency.

6. Issues Not Presented

In the course of its brief, the government discusses two issues which were not preserved in the court below and which were not included within the grant of certiorari. The petitioner does not intend to formally rebut the government's argument on either issue. The two issues must be identified, however, lest petitioner's silence be misinterpreted as agreement with the government's arguments.

First, the government suggests, at page 22, footnote 13 of its brief, that a reinstated direct appeal should be limited to sentencing issues. Petitioner does not agree with this contention. *See Borman*, The Hidden Right to Direct Appeal From a Federal Plea Conviction, 64 Cornell

Law Review 319 (1979). Any objection to the issues presented on direct appeal should properly be decided, in the first instance, by the United States Court of Appeals for the Third Circuit.

Second, the government argues in its brief at page 6, footnote 5, that the district court erred in issuing a certificate of appealability. Petitioner disagrees with this contention, and notes that the government concurred in the application for certificate of appealability (J.A. 190). On the merits of the claim, the Third Circuit has observed that the wording of the certificate of appealability standard may simply reflect imperfect statutory draftsmanship. *Santana v. United States*, 98 F.3d 752, 757 (CA3 1996). Because this issue may be resolved through application of relevant principles of statutory construction, it is appropriate to permit further caselaw development in the district and circuit courts.

7. Harmless Error

The government argues that absent demonstrated prejudice, the petitioner cannot secure post-conviction relief. Petitioner disagrees, and asserts that relief may be granted as a matter of law when the violation of a rule of criminal procedure constitutes "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962).

In *Hill*, the defendant was not afforded the right of allocution, as required by the then-applicable version of Criminal Rule 32(a). This Court held that the error did not support post-conviction relief under 28 U.S.C. §2255. As stated in *Hill*:

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not *of itself* an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.

Hill v. United States, supra, 368 U.S. at 428, 82 S.Ct. at 471 (emphasis added). While concluding that a violation of Rule 32(a) was not "of itself" cognizable, the court left open the question of whether relief would be available "if a violation of Rule 32(a) occurred in the context of other aggravating circumstances . . . " *Id.*, 368 U.S. at 429, 82 S.Ct. at 472. In this regard, the Court stated as follows:

> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether §2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a

> failure to comply with the formal requirements of the Rule.

Id., 368 U.S. at 429, 82 S.Ct. at 472.

The above-cited excerpts from *Hill* suggest that there are two ways to secure post-conviction relief where the defendant shows that there was a violation of a rule of criminal procedure. First, violation of the rule might "of itself" be cognizable if the violation "inherently results in a complete miscarriage of justice," or if the violation represents "an omission inconsistent with the rudimentary demands of fair procedure." In the alternative, even if the rule was not of inherent or rudimentary importance, the defendant would still have an opportunity to secure post-conviction relief if the rule violation was combined with prejudice to the defendant.

Mr. Peguero asserts that the failure to notify a defendant of his appellate rights is itself "an omission inconsistent with the rudimentary demands of fair procedure." He requests relief as a matter of law because Rule 32(a)(2) serves several interests which are properly classified as rudimentary demands of a fair system of criminal procedure.

Judicial notification of appellate rights protects the defendant's fundamental right to choose an appeal. It guards against the risk that the right of appeal will be inadvertently lost due to the ignorance of defendant or his counsel. It ensures that any decision to waive an appeal is made knowingly and voluntarily, with a full understanding of the right to a free attorney on appeal. Additionally, judicial notification is the only way to ensure that defendants are effectively notified of their

appellate rights. As stated in the Amicus Brief of the NACDL at page 17:

> This advice, as the Rule implicitly recognizes, must come from the district court itself, not from counsel. Coming from a neutral judge, it carries the weight of authority and impartiality. Coming from the decisionmaker whose rulings would be challenged, it removes any question of intimidation or fear of reprisal from the mind of an unsophisticated defendant. Coming from the court, it constitutes a guarantee of fairness, not tactical advice.

Finally, judicial notification of the right of appeal assumes enhanced importance under our current system of guideline sentencing. Months or even years of additional imprisonment may result from a misapplied adjustment, an error in arithmetic, or a simple failure to properly transpose numbers from a guideline grid. Given the frequent severity of guideline sentencing, it is essential that defendants be informed that they have the right to appeal their sentences. For all these reasons, the failure to notify defendants of their appellate rights should be deemed "an omission inconsistent with the rudimentary demands of fair procedure" justifying post-conviction relief as a matter of law.

CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be reversed, and that the case be remanded with instructions to reinstate petitioner's right to take a direct appeal.

Respectfully submitted,

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